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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 193

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WATERMAN STEAMSHIP CORPORATION,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF AND ARGUMENT OF WATERMAN STEAMSHIP CORPORATION.

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BRIEF AND ARGUMENT OF WATERMAN STEAMSHIP CORPORATION.

This Court granted the petition of National Labor Relations Board praying that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Fifth Circuit to review the judgment of that Court which was entered on April 11th, 1939, the opinion of the Circuit Court of Appeals being reported in 103 Fed. (2d) 157 (R. 537-541).

The case was presented to the Circuit Court of Appeals on a petition of the Waterman Steamship Corporation seeking the vacation of what it considered a most unjust and unfounded order issued by the

National Labor Relations Board in which the said Board had entered the usual order to cease and desist and post notices; ordered the Waterman Steamship Corporation to offer re-employment to some forty-three members of the crews of the S. S. "Bienville" and S. S. "Fairland," two of its ships, and to C. J. O'Connor, the Second Assistant Engineer of the S. S. "Azalea City," without prejudice to their seniority and other rights and privileges; ordered it to make whole the members of such crews for losses of pay and reasonable value of maintenance on shipboard since the termination in July, 1937, of their employment with the Waterman Steamship Corporation, and also ordered the Waterman Steamship Corporation to issue passes to representatives of the National Maritime Union of America (hereinafter referred to as N. M. U.), an affiliate of the Committee for Industrial Organization (hereinafter referred to as C. I. O.), (R. 103-119).

The opinion of the Circuit Court of Appeals is so eminently correct, under the facts presented by the Record, that we wish to call this Court's attention to some of the more important phases of the testimony on which the Waterman Steamship Corporation relied and on which the Circuit Court of Appeals based its opinion. Especially do we consider this necessary in view of some very important portions of the Record not referred to in brief filed by petitioner in this Court.

The Record in the Court below with numerous Exhibits was most voluminous, consisting of more than 1,000 pages. The Circuit Court of Appeals made a very full, careful and exhaustive study and consideration of the entire Record and we could not better state the situation shown by the Record than to here summarize the opinion of the Court of Appeals which found: That the Waterman Steamship Corporation has been dealing fairly with the labor unions; that where a majority of its employees in a particular class

were members of a union it contracted to employ men who belonged to that union regardless of the union's affiliation; that it has not organized a company union, nor sponsored any certain union, nor discharged its employees for union activity or affiliation; that it entered into a contract and gave preference of employment, in selecting the unlicensed personnel of its crews, to members of the International Seamen's Union of America (hereinafter referred to as I. S. U.), an affiliate of the American Federation of Labor (hereinafter referred to as A. F. of L.), for the reason that a majority of its employees of this class were members of that union; that such preferential employment contracts are valid; that the evidence is virtually without dispute that repairs on the two steamships in question had been planned by the company long before the crews changed their membership from one union to another; that when the ships were laid up for repairs the crews were discharged only for reasons of economy; that there was no effort on the part of the Waterman Steamship Corporation to make war on the unions; that the evidence does not even point in that direction; that some of the members of the crews were employed in the shops while the ships were laid up; that the engineers of the Waterman Steamship Corporation were members of the Marine Engineers Beneficial Association (hereinafter referred to as M. E. B. A.), a C. I. O. affiliate, and that no effort was made to discharge them; that, notwithstanding such C. I. O. affiliation, it may be concluded that all of these engineers, with the exception of O'Connor, were still working for the Waterman Corporation; that the finding of the National Labor Relations Board that the ships were laid up as an excuse to get rid of the men is based on suspicion and not on the evidence; that when the time came to employ crews for the S. S. "Bienville" and S. S. "Fairland," after they had been repaired, the Waterman Steamship Corporation was bound under its contract to select its unlicensed em-

ployees from the membership of the I. S. U.; that the National Labor Relations Board, by its order, would penalize the Waterman Corporation for keeping its contract; that the attitude of the Waterman Corporation in refusing to issue passes to representatives of either union to come aboard its vessels to organize and recruit members, is clearly shown by the order addressed to the Masters of all vessels in July, 1937, instructing such Masters that the Steamship Company would not allow any delegates from either union to board its vessels for the purpose of soliciting memberships; that under the provisions of the contract with the I. S. U. their representatives were granted passes to go aboard vessels to collect dues from its members but both unions were alike denied passes to solicit memberships; that the trouble was not of the making of the Waterman Steamship Corporation; that the controversy emanated from a fight between two unions and nothing more; that as they fought to oust each other the Waterman Steamship Corporation became the victim; that one may conclude from the evidence that if the union representatives were permitted to go aboard the ships to organize and recruit members, business and shipping in all probability would be shunted aside while the rival unions staged a battle for supremacy; that the Waterman Corporation was within its rights when it forbade the representatives of either union to come aboard its vessels for the purpose of soliciting memberships; that it played no favorite and the National Labor Relations Board erred in its order in this respect; that while the National Labor Relations Board has wide discretion in administering the Wagner Act, yet in so doing it must deal fairly with all parties; that it has the duty to decide the case before it on all of the evidence and should not arbitrarily cast away all the undisputed evidence that is inconsistent with its findings; that if its findings are supported by substantial evidence they should stand but the test of substantial evidence, however, is not satis-

fied by evidence which merely creates a suspicion; that the special finding of the National Labor Relations Board as to Edmund J. Pelletier, Steward of the S. S. "Bienville," is not supported by the evidence as the Record shows without dispute that the Captain of the S. S. "Bienville" had written from a foreign port to the Port Captain at Mobile, complaining of the way in which Pelletier was running the Steward's Department aboard ship; that the Waterman Corporation had a right to discharge Pelletier for cause; that all employers have wide latitude in employing and discharging employees, the only requirement of the National Labor Relations Act being that the employee must not be discharged on account of union activities and union affiliations; that the evidence shows that there is no merit in the Board's finding that C. J. O'Connor, Second Assistant Engineer on the S. S. "Azalea City," was discharged for his participation in a collective protest and for holding membership in the M. E. B. A.; that O'Connor was not discharged; that the Port Captain did not discharge him but directed him to take a vacation when he arrived in Mobile, which he did; that the evidence tends to show that O'Connor was in the habit of taking voluntary vacations at frequent intervals; that O'Connor has never returned and formally made request to be placed on active duty; that he is entitled to be paid for the number of days that the Company allows and grants for vacation to its employees in his class, and upon application he is also entitled, if he can satisfactorily qualify, to be offered reinstatement to his former position; and that the petition of the Waterman Steamship Corporation should be granted and the order of the National Labor Relations Board be vacated except as modified and approved as to C. J. O'Connor (R. 537-541).

Waterman Steamship Corporation vs. National Labor Relations Board, et al., 103 Fed. (2d) 157.

As above suggested, this opinion contains about as concise and clear-cut a statement of what the Record shows as could be given.

We doubt if there has ever been a complaint filed under the Wagner Act against a Steamship Corporation, or against any other employer of labor, which had as little justification as the complaint filed in this case. The Waterman Steamship Corporation has at no time and under no circumstances been an employer corporation which fought labor unions. As well pointed out in the very able opinion of Circuit Judge McCord, the controversy in the instant case was not really a controversy between the Waterman Steamship Corporation and the C. I. O. affiliate known as the National Maritime Union (N. M. U.), but was a fight which had been waged for some time between the International Seamen's Union of America, an affiliate of the American Federation of Labor, and the National Maritime Union, an affiliate of the Committee for Industrial Organization, to gain supremacy in the selection of the unlicensed personnel of Steamship Companies.

The Record shows without conflict that at all times the Waterman Steamship Corporation had recognized as the appropriate bargaining agency that union to which a majority of its employees in the respective departments belonged. For example, the Waterman Steamship Corporation made a contract with the I. S. U., an A. F. of L. affiliate, as the appropriate bargaining agency for its unlicensed personnel and the Record shows without conflict that this particular group of employees of the Waterman Steamship Corporation was 100% members of the International Seamen's Union of America. The Trial Examiner in his Intermediate Report expressly found that this contract was valid because all of the employees in that particular group belonged to the I. S. U. at the time the contract was made.

The preferential employment contract between Waterman Steamship Corporation and the International Seamen's Union of America, in force at the time of the occurrences referred to in this case, contained the following provision:

> "Section 1. It is understood and agreed that as vacancies occur, members of the International Seamen's Union of America, who are citizens of the United States, shall be given preference of employment, if they can satisfactorily qualify to fill the respective positions; provided, however, that this Section shall not be construed to require the discharge of any employee who may not desire to join the Union, or to apply to prompt reshipment, or absence due to illness or accident." Section 1, Article II, Respondent's Exhibit No. 14 (R. 171).

All of the seamen whose names are listed in these proceedings entered the employment of the Waterman Steamship Corporation as members of the International Seamen's Union of America, and each of them, before entering upon a voyage on a Waterman Steamship Corporation boat, signed the usual shipping articles providing for only one voyage.

When the S. S. "Bienville" and the S. S. "Fairland" reached the Port of Tampa on their return voyage to this country, an organizer of the National Maritime Union of America (N. M. U.) boarded the vessels and represented to the crews, in substance, that the officers of the I. S. U. at Mobile had skipped out with all the money of that Union, and that the I. S. U. was no longer functioning at the Port of Mobile, and if these seamen wished to go back to sea after reaching Mobile, it would be necessary for them to join the N. M. U., which was then in control of the furnishing of seamen to vessels leaving the Port of Mobile.

During the hearing before the Trial Examiner, a number of affidavits made by members of the crews of the two vessels in question were offered in evidence before the Trial Examiner, by the attorneys for the I. S. U., which had intervened in this proceeding, these affidavits setting forth in considerable detail the representations made to members of the crews of these two ships by the N. M. U. organizers at Tampa, Florida, in order to get these seamen to change their union affiliation. The Trial Examiner refused to admit these affidavits in evidence, but the National Labor Relations Board, by order entered May 13, 1938, (R. 103), ordered that these affidavits be incorporated in the Record as Respondent's Exhibits 1-13 for identification. The original affidavits are on file in Court.

When the S. S. "Bienville" and the S. S. "Fairland" reached the Port of Mobile, the members of the crews were paid off and discharged in the presence of the United States Shipping Commissioner, as required by statute, and the S. S. "Bienville" was taken off its run for some three or four weeks, while very extensive repairs and additions were made thereto, and the S. S. "Fairland" was dry-docked for the purpose of having her tail shaft drawn for inspection, which was due about July 10th. The plan, as shown by the undisputed testimony, to lay up the "Bienville" for these repairs and to have the "Fairland" go on dry dock had been made for a long time prior to the time that any of the members of the crews of these two ships changed their union affiliations from the I. S. U. to the N. M. U.

When the Waterman Steamship Corporation was ready to send these ships out on another voyage they were required, under the preferential contract above referred to, to give preference of employment to members of the I. S. U., and this was done. In fact, the Waterman Steamship Corporation was notified by the

representatives and attorney of the I. S. U. that if they failed to abide by their contract to give preference of employment to members of the I. S. U., the Waterman Steamship Corporation would be sued for damages for breach of contract.

Of course, while the ships were tied up at Mobile it would have been mere waste of money, and certainly not economical operation, to have kept crews on these ships. However, the Record shows that the Waterman Steamship Corporation did give employment in their repair shops on shore to members of these two former crews who joined the N. M. U. and were no longer eligible, under the existing contract between the Waterman Company and the I. S. U. for employment as seamen on the vessels of the Waterman Company.

The N. M. U. organizers insisted on the Waterman Steamship Corporation's granting passes to representatives of that Union to board its vessels for the purpose of soliciting membership in their Union. However, the Waterman Steamship Corporation refused to permit representatives of either union to board its vessels for the purpose of soliciting membership, and a letter was addressed to the masters of all of its vessels relative to denying passes to representatives of either union for the purpose of soliciting membership in such unions, and the Waterman Steamship Corporation further notified the agent for the I. S. U., with which union it had a contract, to the same effect. The letter which Executive Vice-President Nicolson, of the Waterman Steamship Corporation, addressed to the masters of all vessels, under date of July 13th, 1937, was as follows:

"TO ALL MASTERS:—

In view of the fact that the National Labor Relations Board are now holding elections to deter-

mine whether the N. M. U. or the I. S. U. should represent the unlicensed members of our crews in collective bargaining, we have decided that we will not allow any delegates from either union to board our vessels for the purpose of soliciting memberships.

(Signed) N. Nicolson,

Executive Vice-President." (R. 298).

SUMMARY OF ARGUMENT.

POINT 1.

Waterman Steamship Corporation had a contract with International Seamen's Union which is recognized by the National Labor Relations Act as valid and binding. This contract required Waterman Steamship Corporation, as vacancies occurred, to give preference of employment to members of the I. S. U.

POINT 2.

The seamen on the S. S. "Bienville" and the S. S. "Fairland" had signed shipping articles for one voyage only. Under the statutes of the United States, the employment of the seamen on board each of these vessels terminated as a matter of law when the vessels returned to Mobile, the final port of discharge, and the men were paid off and discharged before the United States Shipping Commissioner. When these ships were again ready to sail, vacancies existed within the meaning of the contract with the I. S. U., obligating Respondent to give preference of employment to members of the I. S. U.

Title 46, United States Code, Sections 563, 564, 565, 566, 567, 568, 572, 574, 596, 603, 604, 641, 642, 643, 644, 645.

POINT 3.

There is no sufficient evidence in the Record to sustain the Board's finding that the Waterman Steamship Corporation discriminated against any of its employees in regard to hire or tenure of employment, in violation of the National Labor Relations Act.

The findings of fact by the Board are not conclusive unless they are supported by substantial evidence which can afford a substantial basis from which the fact in issue can be reasonably inferred, and it must do more than create a suspicion of the existence of the fact to be established.

National Labor Relations Board v. Columbian Enameling & Stamping Company, Inc., 306 U. S. 292.

See, also:

Peninsular & Occidental Steamship Company v. National Labor Relations Board (5th C. C. A.), 98 F. (2d) 411, (certiorari denied 305 U. S. 653).
National Labor Relations Board v. Union Pacific Stages (9th C. C. A.), 99 F. (2d) 153.

There is no evidence whatsoever in support of the Board's finding that Respondent arranged the lay-ups of the vessels for the purpose of facilitating discriminatory discharges of the crews. There is an abundance of clear and undisputed evidence in the Record showing that Waterman Steamship Corporation had made plans, long before the change in union affiliation, to

lay up both the S. S. "Bienville" and the S. S. "Fairland" for repairs.

Edmund J. Pelletier had been found by his superiors to be inefficient, and this was an additional reason why Respondent did not re-employ him. C. J. O'Connor was not discharged, but voluntarily left Respondent's service to take a vacation, and never re-applied for employment. The National Labor Relations Act does not empower the Board to substitute its judgment for that of the employer in the conduct of his business, and does not deprive the employer of the right to select or dismiss his employees for any cause except actual discrimination because of union affiliation.

Associated Press v. National Labor Relations Board, 301 U. S. 103.
National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1.
National Labor Relations Board v. Union Pacific Stages (9th C. C. A.), 99 F. (2d) 153.

Waterman Steamship Corporation showed no favoritism between members of the I. S. U. and members of the N. M. U. Preference of employment was given to I. S. U. members only where required by the contract in existence. After the "Bienville" and the "Fairland" were laid up, the former members of their crews, who were then members of N. M. U., were given employment in the repair shops on shore, which were open shops. The Respondent had a contract with M. E. B. A., a C. I. O. affiliate, and all of its Engineers were members of this Union.

The Board's findings that the lay-up of the ships was arranged to facilitate a discriminatory discharge of the crews, and that there was discrimination in the allotment of shore work are based upon suspicion rather than upon any substantial evidence.

POINT 4.

There is no sufficient evidence in the Record to sustain the Board's finding that Respondent violated Section 8(1) of the Act by discriminating in the issuance of passes to union representatives. Petitioners admit in their brief that there would be no discrimination if Respondent barred both unions from soliciting membership on board its vessels. The Record shows conclusively that this is exactly what Respondent did. There is no evidence whatsoever in the Record that Respondent allowed any members of I. S. U. to solicit membership on board its vessels.

ARGUMENT

POINT 1.

THE CONTRACT BETWEEN WATERMAN STEAMSHIP CORPORATION AND INTERNATIONAL SEAMEN'S UNION WAS A VALID CONTRACT AND BOUND WATERMAN STEAMSHIP CORPORATION TO GIVE PREFERENCE OF EMPLOYMENT TO MEMBERS OF THE I. S. U. WHEN HIRING NEW CREWS FOR THE S. S. "BIENVILLE" AND S. S. "FAIRLAND".

The validity of the contract entered into between the Waterman Steamship Corporation and the International Seamen's Union of America, which was in full force and effect during all of the times herein referred to, under the terms of which contract preference of employment was to be given the members of the I. S. U., is not questioned by the petitioner. In fact, the Trial Examiner in his Intermediate Report expressly found that the contract was valid. We quote from the Trial Examiner's Report as follows:

"Indeed, the evidence with respect to at least two of the ships involved in the present proceedings, namely the "Bienville" and the "Fairland", shows that their crews belonged one hundred per cent to the I. S. U. in the middle of 1937. The contract of March 9th, 1937, was thus valid in its inception. It was made as a group contract which was signed by many other shipping companies in addition to the respondents." (R. 51).

As a matter of fact, it is admitted on all sides that there is no question but that an overwhelming number, if not one hundred per cent, of all of the unlicensed employees of the Waterman Steamship Corporation, not only on the two ships in question, but on its entire fleet of ships, have belonged to the I. S. U. for some time. Therefore, the Trial Examiner could have gone further and stated that the record showed without dispute, that as early as March, 1936, the unlicensed personnel of all of the Waterman Steamship Corporation's vessels were one hundred per cent I. S. U. (R. 51).

It will be recalled that in this case, as well as in the case of Peninsular & Occidental Steamship Company vs. National Labor Relations Board, 98 F. (2d) 411, (certiorari denied 305 U. S. 653, 83 L. Ed. 224) that no bargaining agent had been designated by the National Labor Relations Board. The election heretofore ordered by the Board has never yet been held, and in discussing this situation Judge Foster, in his opinion in the Peninsular & Occidental Steamship Company case, made the following comment:

"The right of an employer to make a contract with a labor union and to require membership therein as a condition of employment is expressly recognized by the Act. 29 U. S. C. A. Sec. 158 (3). The contract with the International Seamen's

> Union was a valid, existing agreement at the time the crews were discharged and no other bargaining unit had been designated. Under its terms the company was obliged to give its members preference in reemployment. * * * No other bargaining agent having been designated by the Board, in employing new crews the company was bound by its contract to give preference to the International Seamen's Union. Had it not done so it would have been subject to charges for violating the Act.
>
> Peninsular & Occidental S. S. Co. vs. N. L. R. B. (5th C. C. A.), 98 Fed. (2d), 411 (414-15). (Certiorari denied 305 U. S. 653).

The contracts which the International Seamen's Union of America entered into with various Steamship Companies were uniform throughout the country.

The Record shows, without controversy, that the International Seamen's Union has lived up to its contract with the Waterman Steamship Corporation and has been in a position to furnish the Waterman Steamship Corporation with competent crews at all times (R. 285). Likewise, the Waterman Steamship Corporation has lived up to its contract with the I. S. U.

The only case in which the Waterman Steamship Corporation under its contract was not required to give preference of employment to members of the I. S. U. was in case of "prompt reshipment". Of course, this exception could have no possible application to the situation here presented, where the S. S. "Bienville" was tied up for repairs, alterations and additions for some three or four weeks, and the S. S. "Fairland" went on dry dock and was tied up for practically a week. While the testimony of witnesses varies somewhat as to just how many hours a vessel could remain

in port and it could still be said that there was a case of "prompt reshipment", yet, none of the testimony could possibly support a finding that either in the case of the S. S. "Bienville" or in the case of the S. S. "Fairland" there was a "prompt reshipment." In other words, this clause, providing that the giving of preferential employment to members of the I. S. U. should not apply in cases of "prompt reshipment" was inserted in these contracts for the purpose of taking care of the situation where a steamship company might be put to considerable damage if, before signing up a new crew, it had to first offer employment to all available members of the I. S. U. The I. S. U. evidently made this concession in these contracts with the steamship companies in order to protect the steamship companies against a situation where it was important that a ship sail immediately after unloading and where, if a sailing was delayed until employment for the new voyage could first be offered to all available members of the I. S. U., the steamship company might suffer considerable damage from loss of time, etc.

We must not overlook the fact that the Waterman Steamship Corporation had been duly warned by the I. S. U., through its attorney, that if the Waterman Steamship Corporation violated the terms of its contract with the I. S. U., it would be subject to suit (R. 312). Naturally, after being thus put on notice as to the intention of the I. S. U. to hold it to strict accountability in event it violated its contract with the I. S. U., the respondent would not have felt justified, and, in fact, it was not justified, in ignoring its contract with the I. S. U. and refusing to give preference of employment to members of the I. S. U.

The witness William Ross, the representative of the I. S. U., testified quite fully as to the notices or warnings he had given the Waterman Steamship Corporation to the effect that he would insist upon the contract

between the Waterman Steamship Corporation and the I. S. U. being carried out as written, and that suits for damages would be filed against respondent on its failure to comply with its contract (R. 506).

POINT 2.

UNDER THE SHIPPING ARTICLES IN THIS CASE PROVIDING FOR ONE VOYAGE, THE EMPLOYMENT OF THE SEAMEN TERMINATED UPON THE RETURN OF THE VESSEL TO THE PORT OF DISCHARGE.

It is quite apparent from the Record in this case that the decision and order of the National Labor Relations Board is based largely upon the erroneous assumption that a seaman's employment is of a continuous nature. We feel confident that there will be no difficulty in satisfying this Court that such is not the case.

The whole contention of the attorneys for the National Labor Relations Board seems to be that even though a seaman signs shipping articles for one voyage and completes this voyage and comes back to the port of discharge and is formally signed off before the United States Shipping Commissioner, no vacancy exists and he is still an employee of the steamship company. In taking this position our learned opponents have evidently entirely overlooked the relevant Federal statutes bearing on seamen and shipping articles.

It is our contention that not only in the case of the seamen employed on the S. S. "Bienville," which made a voyage to Europe, but also in the case of the seamen on the S. S. "Fairland," which made a voyage to the West Indies, the employment of the seamen by the

Waterman Steamship Corporation was terminated, as a matter of law, when the seamen were paid off and discharged before the United States Shipping Commissioner. It is further our contention that it was the duty of the Waterman Steamship Corporation, under the provisions of the statutes of the United States, to pay off and discharge these seamen before the Shipping Commissioner at the end of the respective voyages, and that, therefore, as a matter of law, there can be no room for the contention that the discharge of these seamen was motivated by their union affiliation and activities.

For convenience, we shall first discuss the law applicable to the discharge of the seamen employed on board the S. S. "Bienville" for a voyage to Europe, and we shall then proceed to a discussion of the law applicable to the seamen employed on board the S. S. "Fairland" for a voyage to the West Indies.

The statutes absolutely require the signing of shipping articles for a European voyage, the provisions in this respect being as follows:

> "**Sec. 564. Shipping articles.** The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, **shall**, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter, and shall be

dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars:

"First. The nature and, as far as practicable, the duration of the intended voyage or engagement, **and the port or country at which the voyage is to terminate.**

"Second. The number and description of the crew, specifying their respective employments.

"Third. The time at which each seaman is to be on board, to begin work. * * *"

Title 46, U. S. Code, Section 564.

Both the vessel and the master are made liable to a penalty for carrying seamen to sea without making the written agreement required by law.

Title 46, U. S. Code, Sections 567, 568.

It is further provided that the master of the vessel may engage seamen "in the manner provided by law to serve on a voyage to any port, **or for the round trip from and to the port of departure,** or for a definite time whatever the destination."

Title 46, U. S. Code, Section 572.

The shipping articles for the S. S. "Bienville," which are in evidence in this case as Respondent's Exhibit No. 23, provided for a voyage "to Havre, France, via one or more coastwise ports, and such other ports and places in any part of the world as the Master may direct, and back to **a final port of discharge in the United States.**" Therefore, upon the return of the vessel to Mobile, Alabama, from this voyage, and upon the discharge of the cargo in Mobile, the term of employment

of the seamen, under the provisions of the shipping articles, terminated.

When the cargo of the S. S. "Bienville" was discharged in Mobile, it was the duty of the Waterman Steamship Corporation to pay the wages due to the seamen within twenty-four hours, under the provisions of Title 46, U. S. Code, Section 596.(1) After the employment of the seamen was terminated, under the provisions of the shipping articles, the only manner in which the wages could be paid, in conformity with law, was for the master to pay off and discharge the seamen under the following provision of the statute:

> **Sec. 641. Mode.** All seamen discharged in the United States from merchant vessels engaged in voyages from a port in the United States to any foreign port . . . shall be discharged and receive their wages in the presence of a duly authorized shipping commissioner under this chapter, except in cases where some competent court otherwise directs; and any master or owner of any such vessel who discharges any such seamen belonging thereto, or pays his wages within the United States in any other manner, shall be liable to a penalty of not more than $50."
>
> Title 46, U. S. Code, Section 641.

We wish especially to emphasize the point that under the provisions of the above quoted statute the law requires that in any case where the master or owner pays the wages of a seaman, after the expiration of the term of the employment provided in the shipping

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(1) The applicable part of Title 46, U. S. Code, Section 596 is as follows: "The master or owner of any vessel . . . shall pay to every seaman his wages . . . in case of vessels making foreign voyages . . . within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens."
46 U. S. Code, Section 596.

articles, such payment of wages must be made before the Shipping Commissioner, and the seamen must be discharged before the Shipping Commissioner in the manner required by law.

The statutory provision in respect of the effect of a discharge and settlement before a shipping commissioner is as follows:

> "**Sec. 644. Rules for settlement.** The following rules shall be observed with respect to the settlement of wages:
>
> "First. Upon the completion before a shipping commissioner, of any discharge and settlement, the master or owner and each seaman, respectively, in the presence of the shipping commissioner, shall sign a mutual release of all claims for wages in respect of the past voyage or engagement, and the shipping commissioner shall also sign and attest it, and shall retain it in a book to be kept for that purpose, provided both the master and seamen assent to such settlement, or the settlement has been adjusted by the shipping commissioner.
>
> "Second. Such release, so signed and attested, shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto, on account of wages, in respect of the past voyage or engagement.
>
> "Third. A copy of such release, certified under the hand and seal of such shipping commissioner to be a true copy, shall be given by him to any party thereto requiring the same, and such copy shall be receivable in evidence upon any future question touching such claims, and shall have all the effect of the original of which it purports to be a copy.

"Fourth. In cases in which discharge and settlement before a shipping commissioner are required, no payment, receipt, settlement, or discharge otherwise made shall operate as evidence of the release or satisfaction of any claim.

"Fifth. Upon payment being made by a master before a shipping commissioner, the shipping commissioner shall, if required, sign and give to such master a statement of the whole amount so paid; and such statement shall, between the master and his employer, be received as evidence that he has made the payments therein mentioned."

Title 46, U. S. Code, Section 644.

It appears to us to be clear beyond the necessity of any further argument that when a seaman, employed for one foreign voyage, has been paid off and discharged before a shipping commissioner, in accordance with the provisions of the statutes referred to in the foregoing discussion, the relationship of employer and employee, between the master or owner and the seaman, is definitely at an end. Furthermore, when the shipping articles have been signed for one voyage only, it is the effect of the provisions of the statutes that requires the seamen to be discharged before the shipping commissioner at the termination of the voyage stipulated in the shipping articles. The master or owner has no option except to pay off and discharge the seamen before the United States Shipping Commissioner.

In the case of the coastwise trade and trade to the West Indies, the statute does not require the signing of articles before a shipping commissioner (Title 46, U. S. Code, Section 566), although a written agreement declaring the voyage or term of time for which the seamen are shipped must be made (Title 46, U. S.

Code, Section 574). However, when articles for a voyage in this trade are signed before a shipping commissioner, the payment and discharge of the seamen are governed by section 563 of Title 46 of the United States Code, the pertinent provisions of which are as follows:

> "**Sec. 563. Shipment of crews by shipping commissioners; shipping agreements.** Shipping commissioners may ship crews for any vessel engaged in the coastwise trade, or the trade between the United States and . . . the West Indies, . . . at the request of the master or owner of such vessel.
>
> "When a crew is shipped by a shipping commissioner for any American vessel in the coastwise trade, or the trade between the United States and . . . the West Indies, . . . as authorized by this section, an agreement shall be made with each seaman engaged as one of such crew in the same manner as is provided by sections 564 and 565, not however including the sixth, and eighth items of section 564, and such agreement shall be posted as provided in section 577, and such seamen shall be discharged and receive their wages as provided by the first clause of section 596, and also by sections . . . 603, 604, . . . 641 to 645, inclusive, . . ."
>
> Title 46, U. S. Code, Section 563.

For the convenience of the Court, we shall briefly identify the various sections which are referred to in the statute above quoted. Section 564 is the section requiring foreign bound vessels to sign shipping articles, and prescribing the provisions which these articles must contain. This Section 564 of Title 46 of the U. S. Code has already been referred to and quoted in this brief.(a) The sixth and eighth items, which are

(a) Page 18 of this brief.

excepted, are not relevant to the matter under discussion. Section 565 referred to above is the statute referring to the manner of signing the articles before the Shipping Commissioner.

The first clause of Section 596, which is referred to in the statute above quoted, is as follows:

> "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; . . ."

Title 46, U. S. Code, Section 596.

Sections 603 and 604, which are referred to in the above quoted portion from Section 563 of Title 46, U. S. Code, provide that in the event wages are not paid within a certain time after they become due by law, the seamen may summon the master to appear before a Court and may libel the vessel for wages.

Title 46, U. S. Code, Sections 603, 604.

Section 641 referred to in the above quotation from Section 563 is the section requiring that all seamen shall be discharged and receive their wages in the presence of a duly authorized shipping commissioner. This section has been referred to and quoted previously in this brief.[3] Sections 642 to 645, inclusive, also referred to in the quotation from Section 563, provide certain rules and regulations in connection with the discharge before the Shipping Commissioner. Section 644, which is included among these sections, has been quoted in full in this brief,[4] and is the section provid-

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[3] Page 20 of this brief.

[4] Page 21 of this brief.

ing that the release signed before the Shipping Commissioner shall be a full release and discharge from further claims.

In other words, when the United States Shipping Commissioner ships crews for a vessel engaged in trade with the West Indies, then the seamen must sign articles which are identical with the articles signed by seamen on a foreign voyage (with certain immaterial exceptions), and they must be discharged before the United States Shipping Commissioner in accordance with the provisions of exactly the same statutes which apply to vessels engaged in foreign trade. The mandatory provisions of Section 563, Title 46, U. S. Code, are so clear that we do not think any further discussion is required on this proposition of law.

We do wish especially to point out, however, that the shipping articles for the voyage of the "Fairland," which are in question in this case, were signed before the United States Shipping Commissioner, in accordance with the provisions of Section 563, Title 46, U. S. Code, as is shown by the certified copy of shipping articles which are in evidence in this case as Respondent's Exhibit No. 22. We also wish to point out that the shipping articles for the "Fairland" were signed **for one voyage only**, with Mobile, Alabama, named as the final port of discharge.

Therefore, the law applicable to the discharge of the seamen is identical in the case of both the S. S. "Bienville" and the S. S. "Fairland." As we have previously emphasized, the effect of the written contract of employment, stipulating a term of employment for one voyage only, and the effect of the applicable statutes, was to require the discharge of the seamen before the United States Shipping Commissioner at the end of the voyage. Furthermore, as we have also pre-

viously emphasized, we believe that it is clear that upon the termination of the period of employment stipulated in the shipping articles, and upon the discharge of the seamen before the United States Shipping Commissioner, the employment of the seamen by the master or owner was terminated, and there did not remain any relationship of employer and employee.

Counsel for the National Labor Relations Board, the Petitioner, take the position that the employment of a seaman is similar to the employment of any person in ordinary occupations on land. They contend that the employment is continuous until it is terminated by the affirmative act of one party or the other. When separate shipping articles are signed for each voyage and the seamen are discharged at the end of the voyage before the United States Shipping Commissioner, in accordance with the requirements of law, there can be no possible basis for a comparison between the nature of such employment and the nature of employment in ordinary occupations on land. Under the usual method of hiring an employee on land, there is no written contract entered into definitely specifying the period and termination of employment. It is merely implied that the employment shall continue from day to day, or from week to week, as the case may be, as long as it is mutually satisfactory to the employer and the employee. Naturally, under such an arrangement, there must be a definite act by either one party or the other which will bring this relationship of employer and employee to a close. The distinction between this type of employment and the employment of seamen for one voyage only, under the terms of a written contract, is obvious.

While the statutes very clearly define the nature of the employment of seamen, yet, merely for the purpose of having the matter brought clearly before this court we would like to quote briefly from the very

exhaustive report which was recently made by the then United States Maritime Commissioner, Hon. Joseph P. Kennedy. That part of the report from which we wish to quote is found on page 10 of the November 15th, 1937, issue of the Labor Relations Report (Index page 274). The following quotation taken from that report appears under the sub-head "Continuous Employment":

> "It has long been the practice of the sea to sign workers on and off for each voyage. * * * The substitution of continuous employment for the present system should help materially in reducing the heavy labor turnover. In furtherance of this plan there should be a revision of the existing form of **ship's articles.** While these articles give the employer some measure of protection against desertions, and while they insure the men against dismissal in the course of the voyage, they amount to little, in the final analysis, beyond a periodic hiring and firing of the personnel. It is not surprising that the worker, under these conditions, should develop an indifferent attitude toward his job. Continuous employment is the rule in most industries. It should be the rule for shipping."

Counsel for Petitioner emphasize testimony in the Record which, it is contended, establishes the fact that there is a custom in the shipping industry by which the employment of seamen is continuous. Reference is also made to certain terms used in the contract between the Waterman Company and the I. S. U., and to certain terms used by witnesses in their testimony, which Petitioner contends indicates an understanding that such employment is continuous. It should be remembered that the statute provides that seamen may be engaged either for one voyage or for a definite time (Title 46, U. S. Code, Section 572). Many steamship companies may follow the practice of having the

seamen sign articles for a definite time, and, of course, during the period of time covered by the articles, the employment is continuous even though many voyages may be made during such period. The practice of signing articles for a definite period of time is probably followed by the Waterman Company's affiliated company, the Pan-Atlantic Steamship Corporation, which operates coastwise vessels. General testimony as to custom, which might indicate any custom of continuity of employment, undoubtedly refers to instances in which articles of this character have been signed. It can certainly have no application to those cases in which the shipping articles—the written contract of employment between the master or owner and the seamen—expressly stipulate that the term of employment shall be for one voyage, nor could any custom have the effect of varying the provisions of a written contract and the positive requirements of statutory law.

Counsel for Petitioner also refer to testimony in regard to a practice sometimes followed of having some part of the crew on board a ship between voyages, and while the ship is in its home port. Undoubtedly, there may be instances in which there is some work to be done on a ship while it is in its home port. In those instances where the seamen have signed articles for a definite period of time, and such period has not expired, the master or owner would very probably use the services of the seamen who were already under contract of employment. In these instances the employment of the seamen in the home port may be considered as a continuation of their employment at sea. Where articles have been signed for one voyage only, the master or owner may or may not hire for work on the ship in the home port those seamen who have been out on the previous voyage. In many instances, some of the same seamen—or even most of them—might be hired for such work, but this would be an entirely new and distinct employment.

We respectfully submit to the Court that the validity of the contract between the Waterman Company and the I. S. U. not being controverted, and the obligation being imposed upon the Waterman Company by the said contract to give preference of employment to members of that Union, whenever vacancies exist, and the statutes above quoted showing conclusively that vacancies did exist, there was no course left open to the Waterman Steamship Corporation except to comply with its contract and give employment to members of the I. S. U. when these ships were ready to sail again. This situation, in our opinion, completely disposes of the entire case and renders it unnecessary for us to inquire further into the motives or plans of the Waterman Steamship Corporation relative to the two ships in question or to the former members of the crews of these two ships. The Waterman Steamship Corporation being required by its contract and by the statutes above referred to, to take the action which it did take, there can be no possibility of attributing to it any motives of discrimination because it gave preference of employment to members of the I. S. U. when the two ships were ready to sail again.

POINT 3.

THERE IS NO SUFFICIENT EVIDENCE IN THE RECORD TO SUSTAIN THE BOARD'S FINDING THAT THE WATERMAN STEAMSHIP CORPORATION DISCRIMINATED AGAINST ANY OF ITS EMPLOYEES IN REGARD TO HIRE OR TENURE OF EMPLOYMENT IN VIOLATION OF THE NATIONAL LABOR RELATIONS ACT.

While we believe that the propositions hereinabove presented show conclusively that vacancies existed and under the existing contract had to be filled with

members of the I. S. U., yet, the Board has endeavored to go through the voluminous Record in this case and point out certain evidence which the Board contends showed an intention on the part of the Waterman Steamship Corporation to discriminate against members of the N. M. U. This Court has in several recent and well-considered cases very clearly stated what evidence must be shown by the Record in order for the Board's finding of facts to be conclusive. We quote as follows from the opinion of this Court in the case of National Labor Relations Board vs. Columbian Enameling & Stamping Company, Inc., reported in 306 U. S. 292:

> "Section 10 (e) of the Act provides: '* * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. Washington V. & M. Coach Co. v. National Labor Relations Bd. 301 U. S. 142, 81 L. Ed. 965, 57 S. Ct. 648; Consolidated Edison Co. v. National Labor Relations Bd. decided December 5, 1938, 305 U. S. 197, 59 S. Ct. 206; Appalachian Electric Power Co. v. National Labor Relations Bd. (C.C.A. 4th) 93 F. (2d) 985, 989; National Labor Relations Bd. v. Thompson Products (C.C.A. 6th) 97 F. (2d) 13; Ballston-Stillwater Knitting Co. v. National Labor Relations Bd. (C.C.A. 2d) 98 F. (2d) 758, 764. Substantial evidence is more than a scintilla, **and must do more than create a suspicion of the existence of the fact to be established.** 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' Consolidated Edison Co. v. National Labor Relations Bd. 305 U. S. 197, 59 S. Ct. 206, supra, ..."

National Labor Relations Board vs. Columbian Enameling & Stamping Company, Inc., 306 U. S. 292.

We will here quote from two decisions rendered by the Fifth Circuit Court of Appeals and the Ninth Circuit Court of Appeals, respectively, which decisions appear to be in line with the holdings of this Court on the proposition above discussed:

"It is the duty of the Board to decide the case before it on all the evidence. **It is not at liberty to rely upon part of the evidence in support of its findings and put aside all other undisputed evidence.** * * * On all the evidence in the case, the company, in the circumstances shown, was not guilty of violating the National Labor Relations Act. **The findings of the Board are not supported by evidence within the meaning of the law.** It follows that the petition of the company to annul and set aside the order must be granted and the application of the Board to enforce the order must be denied."

Peninsular & Occidental S. S. Co. v. N. L. R. B. (5th C. C. A.), 98 Fed. (2d) 411 (415-6). Certiorari denied 305 U. S. 653, 83 L. Ed. 224.

"It is suggested that this court should accept the findings of the Board; that contradictions, inconsistencies, and erroneous inferences are immune from criticism or attack by Section 10 (e) of the Act, 49 Stat. 453, 29 U. S. C. A. Sec. 160 (e), which provides that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence."

National Labor Relations Board v. Union Pacific Stages (9th C. C. A.), 99 Fed. (2d) 153 (177).

Lay-Up of Vessels

On page 14 of brief filed by the National Labor Relations Board, it is stated that there is abundant evidence to support the Board's finding that respondent arranged the dates and duration of the lay-ups for the purpose of facilitating the discriminatory elimination of the crews. Notwithstanding this bold assertion in brief filed by counsel for petitioner, they fail to cite any of this "abundant evidence". In fact, there is no evidence in the Record that can support the contention that the lay-up of these vessels was for the purpose of facilitating the elimination of the crews. The most that attorneys for petitioner have undertaken to do is to call attention to several trivial matters which they contend were inconsistent with a pre-arranged plan to tie up these two ships upon their arrival at Mobile.

We deem it entirely unnecessary for us to go into details in this brief in discussing the trivial matters referred to in petitioner's brief which they contend are inconsistent with a pre-arranged plan to tie up these vessels, and which they contend support their theory that the ships were tied up for the purpose of getting rid of the members of the crews which had joined the N. M. U. In our opinion it will only be necessary for us to call the Court's attention to the undisputed evidence found in the record which shows conclusively that long prior to the time that any members of the crews of the Waterman Steamship Corporation's ships had left the I. S. U. and joined the N. M. U., plans and arrangements had been made to tie up the S. S. "Bienville" and the S. S. "Fairland" upon their arrival in Mobile for the purpose of repairs, drydocking, etc.

There is not one scintilla of evidence in the Record disputing the very clear and concise testimony of the Company's port captain, Clarence Reed, of Captain

Norman Nicolson, and of Walter Ingram, the Company's assistant port engineer, showing beyond the shadow of a doubt that long before the Waterman Steamship Corporation knew that any of the members of either of these crews had joined the N. M. U., plans had been made for the "Bienville" and the "Fairland" to be tied up for repairs, dry docking, etc., upon the termination of the particular voyages in question. The conclusion of the Board that these vessels were tied up at the end of these particular voyages on account of what had happened on the voyage is absolutely unsound and unsupported by anything appearing in the Record.

The testimony of Capt. Clarence Reed, the Port Captain for the Waterman Steamship Corporation, whose duty it was to keep track of the various vessels, their schedules, etc., is so conclusive on this proposition and so completely refutes any suggestion or intimation that the "Bienville" and "Fairland" were tied up for the purpose of laying off the crews, that we will here quote briefly from Capt. Reed's testimony. Capt. Reed, of course, is the one who kept the records in the premises and is the one whose testimony would necessarily be more accurate than the testimony of witnesses who were merely relying upon their recollection of what had happened some five or six months previously. All dates, plans, etc., are very clearly set forth in the chart or schedule identified by Capt. Reed, which was introduced in evidence and forms a part of the Record in this case, and is marked for identification "Respondent's Exhibit No. 24" (R. 474).

We will here briefly summarize the testimony of Port Captain Clarence Reed on this proposition:

> "Before the 'Fairland' left Mobile on the voyage in question we knew that the ship had to be dry docked on her arrival back in Mobile; this was

for the purpose of having her tail shaft drawn for inspection, which was due about July 10th; we have a schedule headed: 'Inspection-Drydocking-Surveys', showing the listing of a lot of ships and among them is the 'Fairland'; under the heading of 'Date dry docked', is October 28th, 1936, which means that that was the date of her last drydocking; in the next column headed 'Date due' is shown the date of July 28, 1937, which is the date that she has to next be dry docked, as her nine months would then be up and we are only allowed to run these ships for nine months without dry docking; the 'Fairland' was really dry docked a little before July 28th, 1937, but if she had gone out on a trip the early part of July she would not have gotten back to her home port of Mobile in time to comply with the law and go on dry dock July 28th, 1937; the insurance regulations require this dry docking every nine months and we could not obtain insurance policies unless we complied with this requirement; when a ship comes into port if it is so near the expiration of the nine months period that this nine months period would expire while she was at sea, if she went out on another voyage, it is customary to put her on the dry dock before going on this next voyage; if the 'Fairland' had left and was at sea at the time she should have been on dry dock, there would, of course, have been no opportunity to dry dock her at sea, and if she had gone out on that trip without being first put on dry dock we would have been violating our insurance contract; in the next column headed 'Tail Shaft Drawn' appears the date 'July 10, 1934', that means that that was the date that the tail shaft was last drawn; the tail shaft is the part of the shaft that goes through the stern tube of the ship to which the propeller is fastened; in the next column headed: 'Tail Shaft due drawn', appears the date 'July 10, 1937', which means that the

three years from the date on which the tail shaft was last drawn would expire on July 10, 1937; the laws of the Bureau of Marine Inspection and Navigation require these tail shafts to be drawn once every three years for inspection and the three year period would expire on July 10, 1937; this chart or schedule was made up under my supervision and I know it is correct; when the 'Fairland' came into Mobile on July 5th, or 6th, in order to comply with these regulations requiring that the ship go on dry dock and have her tail shaft drawn, we had to put the 'Fairland' on dry dock, as if she had gone back to sea on July 5th or 6th, the three year period would have expired while she was at sea; relative to when I first knew that the 'Fairland'. would have to have her tail shaft drawn on July 10, 1937, I will state that this schedule is on my desk all the time, it is under the glass top of my desk and I keep myself posted on these dates; I knew of this date ever since March, when I came ashore; I mean by 'coming ashore' the time when I became Port Captain in March, 1937; I then knew that the 'Fairland' should go on dry dock and have the tail shaft drawn on July 10, 1937, or as near that date, prior thereto, as she was in port; it was no sudden decision to put this boat on dry dock to have this work done and the fact that some of the crew of the 'Fairland' had joined the N. M. U. did not at any time have anything whatever to do with the 'Fairland' being put on dry dock in Mobile, as it was all prearranged before I knew that any of the crew of the 'Fairland' belonged to the N. M. U.; on July 1st, 1937, I issued to all departments a statement relative to the Steamship 'Bienville', showing her schedule on the voyage in question; this statement was in substance to the effect that the 'Bienville' was due to arrive in Tampa on July 1st, and from Tampa she would proceed to Pensacola and Mobile, and

that voyage No. 2 would end at midnight following the completion of discharge of the Mobile cargo, at which time the vessel would go on inactive status for a period of about twenty days; this statement which was issued to all departments, was signed by me, and issued by me before I ever heard of any N. M. U. activity in Tampa; attached to this letter or statement is a sailing schedule of the Waterman Company's vessels, including the 'Bienville', which schedule is headed: 'Sailing Schedule, April through August, 1937'; that statement is a correct statement of the sailing schedule of the various vessels, including the 'Bienville', as furnished to me by the Traffic Department; this sailing schedule showed that the 'Bienville' was to sail May 9th for Havre, Antwerp, Rotterdam, Bremen and Hamburg and was due to return to the Gulf on July 2nd, the turn around being about sixty days; that was the schedule which the 'Bienville' made on this trip; instead of July 2nd, she really returned about July 5th or 6th; in this sailing schedule covering the period from April to August, 1937, in the second half of July, where the name of the S. S. 'Bienville' is shown, just opposite this in the next column headed 'Position' is the word 'Repair', then the words 'Gulf, July 7', and in the next column headed 'Due to Sail From', there appears opposite the name of the S. S. 'Bienville' 'July 30'; that was the schedule of the 'Bienville' at that time; this schedule was made up certainly as early as April, 1937, and covers the period from April through August, 1937, and shows a lay-up of the 'Bienville' from July 7 to July 30,—23 days; it did not take any such time as that for this ship to load or unload cargo; that the 23 day period from the time the vessel was due to reach the Gulf on July 7th, and sail on July 30th, was set aside for repairs; I knew as early as April, 1937, that that would be plenty of time for

the 'Bienville' to have her repairs and then leave with her return cargo; I know that this statement is a correct statement furnished by the traffic department, and I further know that I had this schedule or chart in my possession as early as April, 1937." (This sailing schedule or chart was admitted in evidence as Respondent's Exhibit No. 25) (R. 472-476).

Captain N. Nicolson, the Executive Vice-President of the Waterman Corporation, also testified fully relative to the pre-arranged plans to tie up these two ships and showed conclusively that the ships were not tied up as a result of a majority of the crews having joined the N. M. U. In brief for opponents much stress is laid on the fact that there was some inconsistency in the testimony of Captain Nicolson as to whether the steel for the repair work was ordered for the S. S. "Bienville" or for a sister ship, the "Azalea City." Captain Nicolson testified that it might be that some of the steel in question was ordered for work on the S. S. "Azalea City." Of course, it is impossible for a witness such as Captain Nicolson, having general supervision of over thirty ships, to be able to state, in the absence of written records, with any degree of certainty just what was done and what was planned to be done with each ship for each week during the preceding year. Consequently, in order to have accurate testimony on such subjects, it was necessary to refer to the written records which were kept by Captain Reed. The testimony of Captain Nicolson on this proposition will be found in the Record on pages 287-288. The repairs done on the S. S. "Bienville" were quite extensive.

The nature of these repairs and alterations to the "Bienville" was testified to quite fully by Captain Nicolson as follows:

"These repairs consisted among other things of re-locating the entire crews' quarters and the quarters of the passengers as the respondent found it necessary to put better crews' quarters on the vessel also, extensive boiler work was done on the vessel and in order to do this work it was necessary to kill steam on the ship and when respondent was unable to keep steam on its vessel it was, of course, unable to have quarters for the crew to live in as it would not be able to run its sanitary pump to provide water to the bathrooms and toilets. (R. 287). We lifted the turbine casings for examination and did considerable work on the turbines, also some boiler work; we altered the deep tank into a cargo hold and converted the fore-peak storerooms into fuel oil tanks. Also, certain repairs were done to the passenger quarters and we scaled and painted all of the lower holds of the vessel to the deep load line of the vessel". (R. 288).

On page 19 of brief filed by counsel for the National Labor Relations Board they state that after the S. S. "Fairland" reached Mobile she speedily underwent the routine dry docking, was back in the water within thirty hours ready for service, but was kept idle for several days without any apparent reason. We do not think that the Record bears out this statement. In addition to the routine dry docking there was a very substantial amount of work done on the "Fairland". This was fully testified to by Mr. Walter Ingram, the Assistant Port Engineer of the Waterman Steamship Corporation, who testified as follows:

"When the 'Fairland' was dry docked she was cleaned and painted; her tail shaft was drawn for inspection and we re-wooded the stern bearing and replaced the tail shaft and installed the propeller; after she came off dry dock and immedi-

ately following the work just mentioned we installed rubber gaskets around the port holes in the officers' mess room, steward's room, second and third mates' room, radio room, second assistant and third assistant's room, and mates' and captain's room; installed seven hooks and four port lights; removed and examined and replaced the steering chain, overhauled and freed the steering chain sheaves on poop deck and on the well deck, port side; renewed the bushings, reamed out and renewed eleven engine bed bolts on the port and starboard side, forward end; re-bushed the steering wheel shaft in the control column in the pilot house; turned down the lathe motor commutator; renewed crank disc on spare winch crank shaft; remetaled I. P. cross head slipper and installed the same; repaired the ladder rail to the forecastle; renewed twelve port hole screens; renewed two sheave housing of steering gear chain on port side of after deck; built up and remachined two sheaves pins; built a locker in the linen locker for beer and coca-cola; repaired the springs on bunks in the crews quarters; and renewed one screen door in the chief mate's room and built one small box cover; that the cleaning and painting and the removing of the tail shaft could not be done unless the ship was on dry dock; and that drawing of the tail shaft and re-wooding of the stern bushing or stern tube or bearing, and the installing of the propeller, also had to be done while the ship was on dry dock" (R. 390-392).

Such statements as those above referred to, found on page 19 of brief filed by Counsel for Petitioner, are typical of their method of handling the Record in this case. They have picked out the testimony of one witness and because that witness had no knowledge on some particular subject, have taken the position that there is nothing in the Record to bear out the conten-

tion of the Waterman Steamship Corporation, without considering the testimony of other witnesses, which testimony was in no manner contradicted, and which testimony established without question the contention of the Waterman Steamship Corporation.

We see nothing inconsistent in the testimony of the witness Ingram and the witness Nicolson as to taking the S. S. "Fairland" off schedule. Ingram testified quite fully as to the repairs which had to be done on the S. S. "Fairland". Captain Nicolson testified that the S. S. "Fairland" was a few days late on its schedule and in order to get her back on her schedule they decided to put her back a week on schedule (R. 368). In other words, there are really two reasons why the S. S. "Fairland" did not sail promptly after reaching Mobile. Under the situation above referred to it was absolutely essential for her to go on dry dock for certain work and in addition to the dry docking the repairs above mentioned were also made and in order to get her back on her regular sailing schedule it was necessary for her to be taken out of commission due to the fact that she was already a few days late on her schedule.

In fact, the Trial Examiner found that it was necessary for the "Fairland" to be tied up at the particular time in question, and stated, in his Intermediate Report: "Thus the 'Fairland' could not have made another voyage without violating the regulations." (R. 63).

The Trial Examiner further, in his Intermediate Report, stated:

> "If they (the repairs) were of a kind that had to be made at that particular time there could be no suggestion of any conspiracy" (R. 62).

In reference to the S. S. "Bienville", the attorneys for petitioner, in their brief, commented upon the

fact that the attorneys representing the Waterman Steamship Corporation in the hearing before the National Labor Relations Board in New York City in the case of the American France Line, et al., and International Seamen's Union, had entered into a stipulation showing certain schedules of vessels and that according to this schedule the "Bienville" was supposed to depart on July 2nd and arrive at Panama City July 5th, Pensacola on July 8th, Gulfport on July 9th, and Mobile from July 11th to July 15th. However, this schedule was no doubt furnished to the New York attorneys of the Waterman Steamship Corporation earlier in the season and represented the then contemplated sailings. Evidently, the plans were subsequently changed, certainly as early as April, 1937, according to the testimony of Port Captain Reed, which is nowhere disputed. It was conclusively shown by respondent's Exhibit No. 25 that the "Bienville" was to be laid up at Mobile for repairs from July 7th, 1937, to July 30th, 1937, a period of twenty-three days. As above stated, this accurate chart which Captain Reed kept under the glass top of his desk, showing the sailing schedules and locations of all the Waterman ships from April, 1937, through August, 1937, is, of course, the very best evidence that could possibly be obtained as to the plans of the Waterman Steamship Corporation because this was the record by which the Port Captain, having these vessels in charge, governed his actions. The evidence showed without dispute that this record was made up certainly as early as April, 1937, and the dates given in the stipulation filed in the New York case above referred to were evidently taken from some earlier contemplated sailing schedules,—prior to the time that plans had been made to have this work done on the "Bienville."

In addition to the April to August sailing schedule, there was also introduced in evidence a notice which was issued by the Waterman Office at Mobile, Ala-

bama, bearing date of July 1st, 1937,—prior to the time that some members of the crews of the Waterman ships had joined the N. M. U.,—stating that the S. S. "Bienville" **was due to arrive** at Tampa on that day, which notice continued with the following statement:

> "From Tampa she will proceed to Pensacola and Mobile. Voyage No. 2 (the voyage which actually ended on July 6th), will end at midnight following completion of discharge of Mobile cargo, at which time vessel will go on inactive status for a period of twenty days."

In other words, at the time this notice was issued from the office of the Waterman Steamship Corporation, under date of July 1st, 1937, the "Bienville" had not even reached Tampa, Florida, but the "Bienville" **was due to arrive** at Tampa, Florida, sometime that day. The notice shows on its face that the "Bienville" had not yet reached Tampa, **but was expected.** Consequently, here we have a notice issued from the Waterman offices advising that the "Bienville" would go on inactive status for a period of twenty days, which notice was issued prior to the time that any one connected with the Waterman Steamship Corporation had any intimation whatsoever that any members of the crew of the "Bienville" were even contemplating joining the N. M. U.

It is, therefore, obvious that there is no justification whatsoever for the statement by the Board, in its decision, that:

> "The cancellation of the scheduled stops of the 'Bienville' between Tampa and Mobile, which was never explained by the respondent, indicates that the respondent knew immediately, or shortly thereafter, that the crews of the two ships had joined the N. M. U. in Tampa." (R. 111).

All of the evidence above commented upon clearly establishes the truth of the statement found in the testimony of Captain Nicolson, which is as follows:

> "The fact that the men changed to the N. M. U. had nothing to do with the tying up of the boat, and conceivably **we were not going to tie up any vessel as long as we could earn money with her.**" (R. 288).

In fact, it is only necessary to read the Record in this case to be convinced beyond the shadow of a doubt that the tying up of both the "Bienville" and the "Fairland" was pre-arranged and planned for long before any of the seamen who had previously belonged to the I. S. U. joined the N. M. U.

In the face of all of this conclusive evidence that the plans of the Waterman Steamship Corporation to lay up its ships for repairs were made long before the change of the union affiliations of the crews, and had absolutely nothing to do with such change by the crews, what evidence is there in the Record to support the Board's finding that the lay-up of the vessels was for the purpose of furnishing an excuse to discharge the crews? There is none. The Board's finding is based wholly upon a pre-conceived idea of the Board and its attorneys and Trial Examiner that the Waterman Steamship Corporation must be guilty of violating the National Labor Relations Act because some members of the N. M. U. saw fit to file a complaint against that Company.

Under this state of the evidence, the Board's finding is not only not conclusive, but is clearly erroneous and, we respectfully submit, should be entirely disregarded and set aside.

On page 12 of brief filed by counsel for the Labor Board they call attention to the fact that Captain Norville of the S. S. "Fairland" informed the crew of the ship that they could obtain employment if they quit the N. M. U. and joined the I. S. U. (R. 225-226). There is no controversy between us on this point as whenever the question came up, the members of the former crews of these two ships were advised that the Waterman Steamship Corporation under its contract was compelled to give preference of employment to members of the I. S. U. and so long as these members belonged to the N. M. U. rather than the I. S. U. they could not obtain employment with the Waterman Steamship Corporation unless the Waterman Steamship Corporation was going to breach its solemn contracts.

Pelletier.

So far as E. J. Pelletier, the Chief Steward or Chief Cook on the "Bienville," is concerned, while his employment was terminated at the end of the voyage in the same manner that the term of employment of the other seamen ended, in accordance with the provisions of the shipping articles, yet, the Waterman Steamship Corporation had already determined not to re-employ E. J. Pelletier at any time in the future because his services had been so unsatisfactory.

We are not going to review all of the testimony relative to Pelletier but think it sufficient to call the Court's attention to the fact that Pelletier was apparently unable to render the kind of services which the Waterman Steamship Corporation requires of its stewards. Captain Clarence Reed, the Port Captain of the Waterman Steamship Corporation, testified as to the trouble which they had had with Pelletier. It seems that Captain F. O. Lund was the Master on the "Bienville" on the voyage in question and that on or about June 20th, 1937, Captain Reed, the Port Captain, re-

ceived a letter from Captain Lund written from Havre, France, in which he referred to various matters, including the steward's department. Pelletier was the steward on this ship. Captain Lund wrote to Captain Reed as follows:

> "Anyhow this steward's department don't know how to serve people. Our cooks are claiming some overtime every day. They say that they can't get their work done in nine hours. There is nothing much I can do about it now. If I try to do anything the whole gang may walk out on me. If I had a steward that knew his job, I think things would be different. The second cook claims that if he don't start the fire in the stove at five o'clock A. M., they can't get the breakfast ready by seven-thirty o'clock A. M. The stove is old and don't work so good, but I think if they wanted to they could get their work done all right." (R. 479).

Captain Reed also testified that during all of his experience with the Waterman Steamship Corporation he had never received from any other captain from a foreign port a complaint about any other steward except Pelletier. (R. 479).

There was absolutely no justification for the National Labor Relations Board to take the position that the Waterman Steamship Corporation had determined to dispense with the services of Pelletier on account of union affiliations, because while the "Bienville" was in a foreign port, and long before there was any change from the I. S. U. to the N. M. U. on the part of any of the members of the crew of the "Bienville," the Waterman Steamship Corporation had received the letter of complaint above referred to from the Master of the "Bienville" relative to the unsatisfactory services of Pelletier, and Pelletier would undoubtedly have never been re-employed by the Waterman Steam-

ship Corporation, regardless of whether he had or had not changed his union affiliations.

Aside from the complaint made by Captain Lund of the way in which Pelletier conducted the Steward's Department, it will be recalled that there were some complaints about Pelletier before his ship sailed from Mobile. See the testimony of Harry Fagan, the Port Steward of the Waterman Steamship Corporation, found on pages 443-444 of the Record.

Of course, the National Labor Relations Board is not empowered to substitute its judgment for that of the employer in the conduct of its business, and the Wagner Act did not deprive the employer of its right to select or dismiss his employees for any cause, except where the employee was actually discriminated against because of his union activities or policies. In other words, the Wagner Act does not vest in the Labor Board any managerial authority.

> "The act does not compel the petitioner to employ anyone; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees."
>
> The Associated Press vs. N. L. R. B., 301 U. S. 103 (132), 81 L. Ed. 953 (960-961).
>
> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."
>
> N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1 (45), 81 L. Ed. 893 (916).

"The National Labor Relations Act was not intended to empower the Board to substitute its judgment for that of the employer in the conduct of his business. It did not deprive the employer of the right to select or dismiss his employees for any cause except where the employee was actually discriminated against because of his union activities or affiliation. It did not authorize the Board to absolve employees from compliance with reasonable rules and regulations for their government and guidance. The Act does not vest in the Board managerial authority. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352. The Board vaguely sanctioned certain statements of evidence by mingling them with its findings, without noting, as we have pointed out, that this evidence had been changed or modified upon cross-examination, or shown to be incorrect by other admitted or established facts. From a careful consideration of all the evidence the Court is satisfied that there is no substantial basis for the finding that the drivers were discharged because of their union activities."

N. L. R. B. v. Union Pacific Stages (9th C. C. A.), 99 Fed. (2d) 153 (177).

O'Connor

We will not go into details in discussing the complaint of C. J. O'Connor of the "Azalea City". The testimony of O'Connor and Ingram is quite clear as to the circumstances surrounding O'Connor's leaving the "Azalea City". O'Connor is a member of the Marine Engineers' Beneficial Association, a C. I. O. affiliate, and the evidence shows that the Waterman Steamship Corporation not only in no manner discriminated against members of the M. E. B. A. but it has a contract

with the M. E. B. A. for the furnishing to it of its engineers. O'Connor had some complaint about overtime work but that is not a matter to be properly considered in this case. There was certainly no discrimination against O'Connor because he was a member of the M. E. B. A. as all of the other engineers employed by the Waterman Company, and still retained in its service, are likewise members of this same organization. In fact, there was no proof whatsoever that there was any discrimination against O'Connor on account of his affiliation with any union, as alleged in the complaint.

As a matter of fact it appears that the inclusion in the complaint of any grievance that C. J. O'Connor of the "Azalea City" had was really an after-thought. The complaint was filed against the Waterman Steamship Corporation on the theory that it was in some way discriminating against the members of unions which were affiliated with the C. I. O. The National Labor Relations Board has totally failed to establish any such situation and the Record discloses, without conflict, that the Waterman Steamship Corporation throughout all of its dealings with its employees has, at all times, recognized as the appropriate bargaining unit whatever union represented the majority of its employees in each particular class. So far as O'Connor is concerned, the testimony of Mr. Walter Ingram, the Assistant Port Engineer of the Waterman Steamship Corporation, shows very clearly that O'Connor has really nothing to complain of. Mr. Ingram testified that when a man gets off for a vacation, as O'Connor did, when he is ready to go back to work he either reports to Mr. Ingram, the Assistant Port Engineer, or to Mr. Lemon, the Port Engineer, letting them know that he is ready to go back to work. When he does this his name is put on the list and as jobs come up he will be called for service (R. 389-390). Mr. Ingram further testified that Mr. O'Connor had never reported to him

that he was ready to go back to work, and while he was the one whom O'Connor would ordinarily report to, yet, so far as he knew, O'Connor never applied to any official of the Waterman Steamship Corporation requesting re-employment (R. 390). In fact, Mr. O'Connor really does not contradict the testimony of Mr. Ingram. O'Connor testified that he met Mr. Ingram on the street one day and asked him if he would give him another job, and Mr. Ingram replied that he didn't know. In fact, O'Connor says that Mr. Ingram didn't say he would give him a job and he didn't say he would not give him a job. O'Connor then admits that he never did go up to the office of the Waterman Steamship Corporation and ask for employment, and further admits that he never followed up the apparently casual conversation he had had with Ingram on the Street, to see whether or not he could obtain a job with the Waterman Company (R. 265). We respectfully submit to the Court that when a former employee goes off on a vacation and returns therefrom and never even goes around the office of his former employer to request a job, there could not possibly be any kind of duty on the part of such employer to look this man up and make him a formal offer of employment.

The situation existing relative to C. J. O'Connor and the relief, if any, to which he is entitled could not be more clearly expressed than in the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, where the O'Connor matter was disposed of by the following statement:

> "The evidence shows that there is no merit in the Board's finding that C. J. O'Connor, second assistant engineer on the S. S. "Azalea City", was discharged for his participation in a collective protest and for holding membership in the Marine Engineers' Beneficial Association. O'Connor was not discharged. The Port Captain did not dis-

charge him but directed him to take a vacation when he arrived in Mobile. This he did. The evidence tends to show that O'Connor was in the habit of taking voluntary vacations at frequent intervals. He has never returned and formally made request to be placed on active duty. He is entitled to pay for the number of days the company allows and grants for vacation to its employees in his class. Upon application he is also entitled, if he can satisfactorily qualify, to be offered reinstatement to his former position." (R. 541).

Allotment Of Shore Work.

After certain members of the crews of the two vessels in question severed their union affiliation with the I. S. U. and became members of the N. M. U., and were therefore no longer eligible for employment as seamen on vessels of the Waterman Company, the Waterman Steamship Corporation endeavored to minimize the loss suffered by these seamen by giving them employment in its shops. At its repair shops the Waterman Steamship Corporation conducted an open shop, having no contract with any union which compelled it to only employ the members of that union, and it was therefore able to give employment to the former members of the crews of these two ships who had joined the N. M. U. and were not eligible to sail as seamen when the S. S. "Bienville" and the S. S. "Fairland" were ready to go to sea. The fact that the Waterman Steamship Corporation gave employment to these members of the N. M. U. union at its shops shows conclusively that the Waterman Steamship Corporation was in no manner discriminating against members of that union, except when it was required by its contract with the I. S. U. to give preference of employment to members of the I. S. U.

There is absolutely no merit in the argument used by counsel for the National Labor Relations Board to

the effect that discrimination was shown by testimony of some of the employees that Walter Ingram, Assistant Port Engineer of the Waterman Steamship Corporation, advised some of the members of these crews who joined the N. M. U. that he could not give them employment until they took off the N. M. U. button and re-joined the I. S. U. In making such statements, Ingram was doing nothing more nor less than advising these members of the N. M. U. that the Waterman Steamship Corporation would have to recognize the validity of its contract with the I. S. U. and abide thereby. However, Walter Ingram at no time made any such remarks to these members of the N. M. U. so far as work on shore in the shops of the Waterman Steamship Corporation was concerned, and Walter Ingram and other employees of the Waterman Steamship Corporation arranged to give to these N. M. U. members employment in doing shore work in the shops of the Waterman Steamship Corporation wherever possible. We would like to here quote briefly from the testimony of Walter Ingram on this proposition, which testimony is as follows:

"Q. Mr. Ingram, Mr. Stewart testified here that you told him at one time that he could not get work on the ships of the Waterman Steamship Corporation as long as he had an NMU button. Did you have such a conversation with Mr. Stewart?

"A. I don't remember talking to him personally, but I did tell several of them that in practically those same words, due to the contract that we had with the ISU.

"Q. What was your reason for making that statement to these men?

"A. I was asked to.

"Q. You were asked by the men?

"A. I was asked by some of the men if they could sail in the ships if they belonged to the NMU.

"Q. What was the reason for your conclusion that they could not sail in those ships as long as they were members of the NMU?

"A. Well, according to our contract, we would have to take all the men from the ISU Hall." (R. 393).

There is no merit in the contention that these members of the N. M. U. who obtained work in the shops were discriminated against and laid off prematurely on account of N. M. U. affiliations. The testimony shows without conflict that as the work became slack the employees in the shop were laid off on a basis of the seniority system. In other words, the men who had worked in the shore repair shop for the shortest period of time were, under this system, the first to be paid off when the work slacked up. The testimony of Walter Ingram on this point is as follows:

"The hiring of the men in the shops was not generally under my supervision because the foremen hire their own men. I have general knowledge of the conditions with regard to that employment, but I don't hire the men myself. The system that was followed in determining what men should be allowed to work in these shops when work had to be done was as follows: As we do on any job, we start off with a big push and get everything going that we can, and get everything done as quick as possible, and as the job is completed, why, we lay the men off accordingly. In determining which employees shall be laid off we try to work the seniority system the best we can. I mean by that, that the men who have worked in the

shops for the longest periods of time are the ones who are given preference in continuing to work. The seamen who had previously been on the "Bienville" and the "Fairland" did not have at this time seniority in the shops over some of the other men who were retained after they were laid off." (R. 392-393).

Impartiality of Waterman Steamship Corporation As Between The Unions.

The testimony of Captain Nicolson, as well as the testimony of a number of other witnesses—and none of this testimony is disputed in any manner whatsoever—is that the Waterman Steamship Corporation has at all times recognized as the appropriate collective bargaining unit for these seamen that organization to which all or a great majority of these seamen belonged. For example, Captain Nicolson testified that several years ago the Waterman Steamship Corporation entered into an agreement with the Marine Engineers' Beneficial Association (sometimes herein referred to as M. E. B. A.), a C. I. O. affiliate, and both parties have lived up to this agreement and every engineer in the employ of the Waterman Company is a member of that organization, these engineers being 100 per cent organized and all of them being members of the M. E. B. A. (R. 295). Captain Nicolson, continuing his testimony, stated that as soon as the M. E. B. A. proved that they represented a majority of the engineers on the Waterman ships, the Waterman Company immediately met them as the appropriate collective bargaining agent to represent the engineers, and the Waterman Company then made a contract with the M. E. B. A. in accordance with the Wagner Act. Captain Nicolson also testified that neither he nor his company nor anyone to his knowledge had, at any time, tried to prevent any of the Waterman Com-

pany's employees from self-organization or tried to prevent the members of its crews from forming an association or a society or an organization, to bargain collectively through representatives of their own choosing nor had he or his company at any time tried to interfere with, restrain or coerce any of its employees (R. 295-6).

With further reference to the attitude which the Waterman Steamship Corporation has assumed towards unions, and in addition to the above quoted testimony of Captain Nicolson, we would like to call the Court's attention to the fact that Captain Nicolson also testified that the fact that some of these men had engaged in concerted activities with other employees for the purpose of collective bargaining with respect to rates of pay, etc., had nothing whatsoever to do with the termination of their employment, (R. 294). Captain Nicolson also testified that neither he nor any officer or anyone representing the respondent had at any time tried to persuade any of the seamen to join one union or another, nor had any officer of his company or anyone acting for it, at any time tried to interfere with the men on the ships, or restrain them, or coerce them in any manner as to what union they should belong to (R. 295). Captain Nicolson further testified that it has been entirely immaterial to his company as to what unions, societies, or organizations its seamen belonged to, so long as the respondent was not required to violate its contract (R. 295).

Furthermore, the evidence shows that when the "Fairland" was tied up and went on dry docks for certain repairs, inspection, etc., the three members of the crew of the "Fairland" who belonged to the I. S. U. and had never joined the N. M. U. were released and discharged according to the terms of the shipping articles, their contract of employment, along with the N. M. U. men and no discrimination of any kind was

shown against the members of either union. (R. 352, 395).

We have carefully searched the voluminous Record in this cause and have been unable to find any evidence whatsoever showing or tending to show, that anything that the Waterman Steamship Corporation has done, or anything it has failed to do, has either directly or indirectly, remotely or otherwise, in any manner burdened or obstructed interstate or foreign commerce, in violation of the expressed purpose of the National Labor Relations Act.

> National Labor Relations Act, section 1. (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Supp., Sec. 151).

In support of our contention that the facts in this case were not such as to justify any action by the National Labor Relations Board and in further support of our motion to dismiss the complaint as last amended, filed against the Waterman Steamship Corporation, on the ground that it appeared conclusively from the evidence that neither interstate nor foreign commerce had ever been in any manner burdened or obstructed by the action of the Waterman Steamship Corporation, we wish to call the Court's attention to the testimony of Capt. N. Nicolson, the Executive Vice-President of the Waterman Steamship Corporation, which will be found on page 296 of the Record, as follows:

> "I might add that the Waterman Steamship Corporation is the only steamship company in the United States that has not had a delayed sailing of their vessels, or had any trouble within their vessels during the past three years. Every one of the Waterman Steamship Corporation's vessels on sailing schedule went out with first-class, competent, crews on the boat, it being the only ship-

ping company in the United States which can boast of that record. All of the crews were Union crews (I. S. U., affiliate of A. F. of L.)" (R. 296).

What further proof would anyone need of the fair dealing of the Waterman Company with its employees and of the fact that this Company had sincerely and faithfully lived up to all of its contracts with its employees?

There has been no question of a "company union" and there has been no refusal at any time or even any intimation or suggestion of a refusal at any time on the part of Waterman Steamship Corporation to deal with and bargain with the labor union which represented a majority of its employees in the particular class with which it was dealing.

We have not in any sense a case presented where the Waterman Steamship Corporation is objecting to its employees being organized in a labor union nor have we a case where the Waterman Steamship Corporation has tried to dominate its employees by forming a company union.

Before concluding the discussion of Point 3, showing that there is no sufficient evidence in the Record to sustain a finding of discrimination by Respondent against its employees in regard to hire or tenure of employment, we wish to call the Court's attention to a situation which was pointed out by the Trial Examiner, in his Intermediate Report. (R. 71, 72). Of the entire crews of the S. S. "Bienville" and the S. S. "Fairland" only five members of the crew of the "Bienville" and only one member of the crew of the "Fairland" appeared to testify at the hearing. (Id.). While it

is of course possible that some of these men were at sea at the time of the hearing, nevertheless, it appears to us that the fact that such a very small proportion of them voiced a complaint shows that the majority of the crews of both of these vessels felt that there had been no unfair discrimination. All of them had previously been members of the I. S. U. and were therefore familiar with the contract between Respondent and I. S. U. which required Respondent to give preference of employment to I. S. U. members when the ships were ready to sail again. These men must have realized that they had voluntarily relinquished any right to preferential employment when they changed from membership in the I. S. U. to membership in the N. M. U., and that Waterman Steamship Corporation could in no way be blamed for this situation.

POINT 4.

THERE IS NO SUFFICIENT EVIDENCE IN THE RECORD TO SUSTAIN THE BOARD'S FINDING THAT RESPONDENT VIOLATED SECTION 8 (1) OF THE ACT BY DISCRIMINATING IN THE ISSUANCE OF PASSES TO UNION REPRESENTATIVES.

In the amendment made on September 11th, 1937, to the decision of the National Labor Relations Board in the case of American France Line, et al., and International Seamen's Union of America, in which case the Waterman Steamship Corporation was a party, the Board held that fair conduct of elections requires that employers, to avoid discrimination as to elections, must issue passes, **for the purpose of soliciting membership**, promptly to representatives of rival unions, in equal numbers, or else that passes and admittance to

employers' vessels for such purpose be denied to representatives of both rival unions. We quote as follows from the opinion of the Board in that case:

> "For this reason, it now appears clearly to the Board, notwithstanding any arrangements heretofore suggested or approved, that the companies, in order to avoid discrimination in connection with participation in activities leading up to and surrounding the conduct of the elections, must refrain from the granting of an unequal number of passes to representatives of the I. S. U. and I. L. A. (A. F. L.) jointly and in the aggregate, on the one hand, and N. M. U. (C. I. O.) on the other hand; that is, no greater total number of passes should be issued to representatives **who purport to be soliciting the adherence of the unlicensed personnel with any unions affiliated with the American Federation of Labor than to those soliciting the adherence of unlicensed personnel with the National Maritime Union of the Committee for Industrial Organization.** We deem this essential to the fair conduct of the elections. Likewise, any arrangement under which representatives of one of the rival unions are permitted on board ship without passes, and representatives of the other rival union are denied passes and admittance, must not be made. * * * In order to prevent such discriminatory tactics it is necessary that employers should issue passes promptly to both sides, and in equal numbers, as above set forth, **or else that passes and admittance to the ships be denied to agents or representatives of both rival unions.**"

In re American France Line, et al., and International Seamen's Union of America, Vol. 3, Decisions and Orders of National Labor Relations Board 64 (78-79).

The Waterman Steamship Corporation decided to adopt the course of refusing to issue passes to board its ships to either of the rival unions for the purpose of soliciting membership in these unions, and carrying out this plan, the Waterman Steamship Corporation addressed to the Masters of all of its vessels a letter of instructions under date of July 13th, 1937, which was as follows:

"TO ALL MASTERS:—

In view of the fact that the National Labor Relations Board are now holding elections to determine whether the N. M. U. or the I. S. U. should represent the unlicensed members of our crews in collective bargaining, we have decided that we will not allow any delegates from either union to board our vessels for the purpose of soliciting memberships.

(Signed) N. Nicolson,

Executive Vice-President." (R. 298).

(Respondent's Exhibit No. 16.)

Under the terms of the contract between the Waterman Steamship Corporation and the I. S. U., the representatives of the I. S. U. had the right to go on board the ships of the Waterman Steamship Corporation for the purpose of collecting dues. (See Respondent's Exhibit No. 14, Article II, Section 3.) However, when the Waterman Steamship Corporation decided that it would not permit any soliciting for membership in unions to take place on board its vessels, the Waterman Company addressed a letter under date of July 12th, 1937, to Mr. William Ross, Agent of the International Seamen's Union at Mobile, Alabama, with copies of this letter being sent to Captain Reed and Mr. Ingram, which letter was as follows:

"July 12th, 1937.

Mr. William Ross, Agent,
International Seamen's Union,
Mobile, Alabama.

Dear Sir:

In view of the fact that the National Labor Relations Board is now holding an election to determine whether the N. M. U. or the I. S. U. should represent the unlicensed personnel of our vessels at collective bargaining, we have decided that until the election is held we will not allow members from the N. M. U. or your organization on board our vessels for the purpose of soliciting memberships.

(Signed) N. Nicolson,

Executive Vice-President."

(R. 298-299, Respondent's Exhibit No. 17).

In reply to this letter, this Agent of the International Seamen's Union addressed a letter to Captain N. Nicolson, Executive Vice-President of the Waterman Steamship Corporation, reading as follows:

"July 14th, 1937.

Captain N. Nicolson,
Executive Vice-President, Waterman Steamship Corporation, Merchants National Bank Building, Mobile, Alabama.

Dear Sir:

This will acknowledge the receipt of your letter dated July 12th, 1937.

In reply I would state that passes issued to the agents and delegates of the International Seamen's Union of America have not been used for the purpose of soliciting memberships. Our

agents and delegates board ships only in line with their duties to contact members of the International Seamen's Union of America, collect dues, and attend to matters relative to the work and agreements existing.

The election to be held under the National Labor Relations Board supervision does not in any way affect the agreements in force between the steamship companies and the International Seamen's Union of America.

(Signed) William Ross,

Agent, International Seamen's Union of America."

(R. 299, Respondent's Exhibit No. 18).

Counsel for the Board in their brief submitted in the Court below made the following statement:

"The Board has never contended at any stage of this proceeding that petitioner must allow union organizers aboard its ships. Both the order in the election proceeding, and the order in the present case reserve to petitioner the right to exclude **all** organizers."

Counsel for petitioner makes the following statement in the brief filed in this Court:

"Further, both the discrimination and all danger of strife could have been avoided by barring solicitation by either union, as respondent purported to do." (Petitioner's Brief, p. 42).

This is exactly what respondent did do. It excluded all organizers and barred solicitation by either union. Counsel for petitioner state that respondent made but a pretense of halting solicitation for the I. S. U. How-

ever, they fail to point out any evidence in the re
—and there is none—to show that there was an
tual solicitation of membership by I. S. U. repre
tatives.

The only testimony as to personal knowledge o
activities of the I. S. U. representatives on boar
ships is the testimony of Captain Norville, Mast
the Steamship "Fairland", which testimony ma
summarized as follows:

> "I received a letter dated July 13th, 1937,
> Captain N. Nicolson addressed 'To All Mas
> being Respondent's Exhibit 16 in this case.
> accordance with the instructions in this let
> told the Chief Officers to comply with that l
> and to the best of my knowledge it was ca
> out. I showed the Chief Officer the letter
> instructed him to carry out the orders in th
> ter. In other words I instructed him that I w
> not allow any representatives of either the I.
> or the N. M. U. to come on board the vess
> the purpose of soliciting memberships in e
> union. So far as I know, no member of the
> U. has solicited memberships on board any v
> of which I have been in charge at any time
> I received this letter.
>
> "Generally speaking, representatives of t
> S. U. come on board the ships under the p
> that they are allowed, and collect dues whe
> vessel is paying off. I am generally present
> time the men are being paid off, and to the
> of my knowledge the activity of the I. S. U. r
> sentatives at this time is the collection of
> At no time since I received the letter of July
> 1937 (Respondent's Exhibit No. 16), did I ev
> any representative of the I. S. U. on boar
> ship of which I was in charge, doing any

other than collecting dues from members of the I. S. U." (R. 327-328).

the place of any evidence, counsel for Petitioner rently rely upon the following statement which make in the brief for petitioner filed in this Court:

"It is contrary to human experience to assume that solicitation would not go on merely because of executive pronouncement that representatives of the I. S. U. were to be given freedom of the ships solely to collect dues." (Petitioner's Brief, p. 42).

rtainly, the National Labor Relations Act was r intended to confer upon the Board the power e its assumptions and conclusions of this nature basis for its findings of facts, in substitution for rete and substantial evidence.

unsel for Petitioner assume in their brief that ondent does not deny that there would be a vio- n of section 8 (1) of the National Labor Relations f there had been any discrimination in the grant- f passes to union organizers to board its ships for purpose of soliciting memberships. As the evi- e shows without any contradiction whatsoever there was no discrimination in this respect, it is aps unnecessary to discuss this particular point. ever, we do wish to make it clear that throughout proceedings Respondent has contended that ier section 8 (1) nor any other part of the National r Relations Act can have the effect of forcing the ers of a vessel to allow union organizers, who are employees, to come on board its vessels for the ose of soliciting union memberships. Pertinent isions of section 8 (1) of the National Labor Re- ns Act are as follows:

"It shall be an unfair labor practice, for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

National Labor Relations Act, section 8 (1). (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 158.)

We respectfully submit to the Court that it is the purpose of the above quoted provision of the Act to protect employees rather than to protect outside union organizers. We do not believe that it can be said that the refusal to allow union organizers to board Respondent's ships can in any way have the effect of interfering with the Respondent's employees in the exercise of their rights to self-organization and collective bargaining.

We believe that a reading of the Record in respect to the matter of issuing passes to union representatives will show conclusively that the Respondent has made no discrimination between the rival unions in violation of the Act. The Board has recognized the existing contract with the I. S. U. as valid and binding, and, under this contract, Respondent could not refuse to allow the I. S. U. representatives to come on board its ships for the purpose of collecting dues. However, Respondent positively and consistently took every step which it possibly could take to prohibit any representatives of either union to come on board its ships for the purpose of soliciting union memberships. We respectfully submit to the Court that the United States Circuit Court of Appeals for the Fifth Circuit was correct in its conclusion in this case, stated as follows:

"The Company was within its right when it forbade the representatives of the unions to come

aboard its vessels for the purpose of soliciting memberships. It played no favorite and the Board erred in its order in this respect." (R. 540).

Waterman Steamship Corporation v. National Labor Relations Board, 103 Fed. (2d) 157.

CONCLUSION

In conclusion we wish to summarize briefly as follows:

(1) The finding of the Board that the contract between the Petitioner and the I. S. U. did not bind the Petitioner to give preference of employment to members of the I. S. U., when employing new crews for the S. S. "Bienville" and the S. S. "Fairland", is contrary to law, and is not supported by any substantial evidence.

(2) The employment of the seamen on the S. S. "Bienville" and the S. S. "Fairland" was terminated in compliance with statutory requirements relating to seamen and shipping articles, and the finding by the Board that the discharge of these seamen was due to discrimination because of union affiliation, is contrary to law and is not supported by any substantial evidence.

(3) There is no substantial evidence in the Record to sustain the Board's finding that the Waterman Steamship Corporation discriminated against any of its employees in regard to hire or tenure of employment in violation of the National Labor Relations Act.

(a) There is no evidence in the Record to support the Board's finding that the Respondent ar-

ranged the lay-ups of the vessels for the purpose of facilitating discriminatory discharges of the crews, but there is abundant and undisputed evidence that these lay-ups were for the purpose of making repairs which had been planned long in advance of any change in union affiliation.

(b) The Record clearly shows that Respondent at all times was fair and impartial as between the rival unions, and that it followed the practice of bargaining collectively with the representatives of the majority of its employees in appropriate bargaining units, regardless of the union affiliation of such representatives.

(c) The finding of the Board that Petitioner discriminated against C. J. O'Connor in respect to hire and tenure of employment because of union activities or affiliation, is not supported by any substantial evidence.

(4) The finding of the Board that the respondent discriminated against N. M. U., in violation of the National Labor Relations Act, by its refusal to issue passes to either N. M. U. or I. S. U. for the purpose of soliciting union memberships, is contrary to law and is not supported by any substantial evidence.

The evidence shows conclusively that Waterman Steamship Corporation dealt fairly and impartially with the rival unions, in conformity with the National Labor Relations Act. As stated by the court below, "the trouble was not of the making of the Waterman Steamship Corporation. It emanated from a fight between the unions and nothing more. As they fought to oust each other the Waterman Steamship Corporation became the victim." (R. 540).

We respectfully submit that the findings of the Board in this case are "based on suspicion and not on the evidence," as stated by the court below.

Wherefore, Respondent respectfully submits to the Court that the decision of the court below, setting aside and denying enforcement to the order of the Board (except as there modified), should be affirmed.

Respectfully submitted,

Gessner T. McCorvey,

Mobile, Alabama.

Attorney for Waterman Steamship Corporation.

C. A. L. Johnstone, Jr.,
Mobile, Alabama.

McCorvey, McLeod, Turner & Rogers,
Mobile, Alabama.
Of Counsel.

I, Gessner T. McCorvey, do hereby certify that on this the 2nd day of December, 1939, I mailed copies of the foregoing brief, postage prepaid, to Robert H. Jackson, Esq., Solicitor General of the United States, Washington, D. C., and to Charles Fahy, Esq., General Counsel of National Labor Relations Board, Washington, D. C., counsel for Petitioner.

Executed this 2nd day of December, 1939.

(Gessner T. McCorvey).